EXCERPT FROM TRIAL TRANSCRIPT, APRIL, 1992 CONTAINING TRIAL COURT'S EVIDENTIARY RULING IN ISSUE

THE COURT: The court, on its own motion going to reverse itself on both of the rulings it just made. Its going to permit Dr. Wingeleth to be recalled to the stand and cross examined with regard to the line of questions that Ms. Goeke had begun. . . since he had answered that corroborative data would be . . . of importance to him as a scientist. The reason the court is going to do this is that the case law does not permit Ms. Goeke to call him in rebuttal as her expert since he has been called as Mr. Shindell's expert. Further the court is going to reverse itself on denying Mr. Shindell the right to call Trooper Hurley. If there is some issue that you would like to go into . . .which you did not thoroughly explore when he was called by the People, you . . . have that right and the court will permit you to do that. so what we'll do is one extra. . .re-cross and direct on Dr. Wingeleth. Now, if either side would like to make a record on that, you may.

. . .

MR. SHINDELL: Your Honor, I still object to her line of questioning that she is about to go into the reasons originally stated by the court.

[R: Vol.III, pg. 249, ln. 1 to pg. 250, ln.5].

APPENDIX D

DISTRICT COURT, COUNTY OF JEFFERSON,

STATE OF COLORADO

CASE NO. 92 CR 917, DIVISION 6

(Appeal from County Court Case No. 91 T 9042, Div.C)

DEFENDANT/APPELLANT'S OPENING BRIEF ON APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff/Appellee

v.

CHARLES BRADLEY,

Defendant/Appellant.

Edward Shindel, No. 1128

Attorney for Defendant/

Appellee

126 15th St.

PO Drawer 1929

Idaho Springs, CO 80452-1929

(303) 571-0348

* * * *

IV. ARGUMENT

A. INTRODUCTION

The heart of the trial court's errors in this matter rest in the following ruling:

> The court, on its own motion going to reverse itself on both of the rulings it just made. Its going to permit Dr. Wingeleth to be recalled to the stand and cross examined with regard to the line of questions that Ms. Goeke had begun. . . since he had answered that corroborative data would be . . . of importance to him as a scientist. The reason the court is going to do this is that the case law does not permit Ms. Goeke to call him in rebuttal as her expert since he has been called as Mr. Shindell's expert. Further the court is going to reverse itself on denying Mr. Shindell the right to call Trooper Hurley. If there is some issue that you would like to go into . . .which you did not thoroughly explore when he was called

> by the People, you . . . have that right and the court will permit you to do that. so what we'll do is one extra. . .re-cross and direct on Dr. Wingeleth. Now, if either side would like to make a record on that, you may.
>
> . . .
>
> MR. SHINDELL: Your Honor, I still object to her line of questioning that she is about to go into the reasons originally stated by the court.

[R: Vol.III, pg. 249, ln. 1 to pg. 250, ln.5]. After this ruling the trial court permitted Dr. Wingeleth to be recalled and questioned regarding the effects of different levels of alcohol on the body. Dr. Wingeleth however, had never been qualified as a forensic toxicologist to testify with regard to the effects of alcohol on the body. The jury was given no explanation of the reversal nor was it given any explanation of the difference between forensic toxicology and forensic chemistry and how
that difference should be taken into account in viewing Dr. Wingeleth's testimony. Consequently, the jury could not help

but be confused and utilize improper evidence in its deliberations.

B. THE TRIAL COURT'S REVERSAL IN ALLOWING DR. WINGELETH TO TESTIFY VIOLATED THE VERY RULE THE COURT SOUGHT TO FOLLOW IN MAKING THE RULING.

The trial court reversed its previous rulings and allowed Dr. Wingeleth to testify regarding alcohol effects because it was concerned about the case law which indicates that the prosecution may not steal a defense expert witness and use him to its own ends. The case law thus provides that the prosecution may make no use of a defendant's expert witness at any level other than to cross examine him as with any other witness. It is reversible error to allow the prosecution to do otherwise. While the trial court did not cite the case law to which she was referring, the case of Perez v. People, 745 P.2d 650 (Colo. 1987) stands for that proposition.

Perez expressly establishes that it is a violation of the Defendant's right to effective assistance of counsel for the prosecution to use the testimony of an expert witness hired by

the Defendant unless the prosecution can establish "compelling circumstances for such use of an expert. Relief will be granted to the defendant for such improper use of the expert where there is a reasonable probability that absent the improperly used testimony of the expert, the fact finder would have had a reasonable doubt respecting guilt. Id. at 652.

In this case, the prosecution did not establish compelling grounds to usurp Dr. Wingeleth by making him the prosecution's expert in toxicology and thus his testimony regarding the alcohol effects warrants reversal. There is no evidence or argument in the record which even attempts to raise the issue of compelling grounds.

* * * *

Thus the prosecution has failed to establish the primary ground established by the Court in Perez necessary for the prosecution to use Dr. Wingeleth as its expert in forensic toxicology, compelling need.

Perez requires reversal of the conviction in this case not only because the prosecution failed to establish compelling reasons for its use of Dr. Wingeleth, but because its use of Dr. Wingeleth caused the Defendant prejudice.

Perez requires that the court assess the effect of the improper testimony by examining whether there" is a reasonable probability that absent the improperly used witness, the fact finder would have had a reasonable doubt respecting guilt." 745 P.2d 652. If so, reversal is required. . . .

* * * *

[I]n the absence of the tainted testimony, the jury may have found Dr. Wingeleth's testimony that neither breath test result could be determined to be accurate sufficient to acquit. Thus, the prejudice to the Defendant, required by Perez for reversal, is present here too. . . . .

* * * *

Finally, the Defendant here never waived his objection to the use of Dr. Wingeleth by the prosecution. . . . In short, Dr. Wingeleth's testimony for the prosecution regarding toxicological alcohol effects was precluded by Perez. The circumstances of this case fall squarely within the prohibition of Perez with resultant prejudice to the Defendant.

* * * *

Dated this 31st day of December, 1992.

RESPECTFULLY SUBMITTED,

THE LAW OFFICE OF ED SHINDEL

s/ Edward Shindel

Edward Shindel, No. 1128

126 15th Ave.

PO Drawer 1929

Idaho Spgs., CO 80452-1929

(303) 567-2535 OR 571-0348

DISTRICT COURT, COUNTY OF JEFFERSON,

STATE OF COLORADO

CASE NO. 92 CR 917, DIVISION 6

(Appeal from County Court Case No. 91 T 9042, Div.C)

DEFENDANT/APPELLANT'S REPLY BRIEF ON APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Planitiff/Appellee

v.

CHARLES BRADLEY,

Defendant/Appellant.

Edward Shindel, No. 1128

Attorney for Defendant/

Appellee

126 15th St.

PO Drawer 1929

Idaho Springs, CO 80452-1929

(303) 571-0348

* * * *

II. ARGUMENT

A. INTRODUCTION

Defendant filed this appeal to prevent the prosecution from taking from him backhandedly, rights the constitution will not allow the prosecution to take directly, namely the right to effective assistance of counsel. In the opening brief the Defendant cited the case of Perez v. People, 745 P.2d 650 (Colo. 1987) for the proposition that the prosecution may not usurp the defense's expert witness by calling such witness as its own. To do so violates the Defendant's sixth amendment rights to effective assistance of counsel. The prosecution now attempts to distinguish Perez on the grounds that it is only applicable to the prosecution's case in chief (and therefore, since in this case it did not seek to call the defendant's expert in its case in chief, there was no error). While, technically speaking, this is a distinction, the procedural irregularities of this case make it one without a difference. In substance, the prosecution attempts to inflict upon the Defendant the very evil Perez sought to avoid and justifies it upon mere semantic grounds. Since the

prosecution has failed to rebut the substance of the Defendant's Opening Brief, it should not be permitted to divest the Defendant of his constitutional rights on the basis of empty semantics.

* * * *

DATED this 10th day of March, 1993.

RESPECTFULLY SUBMITTED,

THE LAW OFFICE OF ED SHINDEL

s/ Edward Shindel

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126 15th Ave.

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SUPREME COURT, STATE OF COLORADO

Case No. 93 SC _____

(Regarding Petition for Writ of Certiorari to the Jefferson County District Court in Case No. 92 CR 917, appeal from County Court of Jefferson County, Case No. 91 T 9042, Div. C)

PETITION FOR WRIT OF CERTIORARI

CHARLES BRADLEY

Petitioner-Appellant

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent-Appellee

COMES NOW Petitioner-Appellant Charles R. Bradley, Defendant below, [hereinafter "Petitioner" or "Defendant"], by and through undersigned counsel, and hereby respectfully submits his Petition for Writ of Certiorari, pursuant to C.A.R. 53, as follows:

* * * *

Perez expressly establishes that it is a violation of the Defendant's right to effective assistance of counsel for the

prosecution to use the testimony of an expert witness hired by the Defendant unless the prosecution can establish "compelling circumstances" for such use of an expert. Relief will be granted to the defendant for such improper use of the expert where there is a reasonable probability that absent the improperly used testimony of the expert, the fact finder would have had a reasonable doubt respecting guilt. Id. at 652.

In this case, the prosecution did not establish compelling grounds to usurp Dr. Wingeleth by making him the prosecution's expert in toxicology and thus his testimony regarding the alcohol effects warrants reversal.

* * * *

Perez requires reversal of the conviction in this case not only because the prosecution failed to establish compelling reasons for its use of Dr. Wingeleth, but because its use of Dr. Wingeleth caused the Defendant prejudice.

* * * *

In short, Dr. Wingeleth's testimony for the prosecution regarding toxicological alcohol effects was precluded by Perez. The circumstances of this case fall squarely within the

prohibition of Perez with resultant prejudice to the Defendant.

* * * *

DATED this 7th day of June, 1993.

RESPECTFULLY SUBMITTED,

s/ Edward Shindel

Edward Shindel, No. 1128

Attorney for Petitioner

126 15th St.

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